CC Docket #96-98

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request by ALTS for Clarification	)	
for Clarification of the Commission's Rules	)	CCB/CPD 97-30
Regarding Reciprocal Compensation for	)	
Information Service Provider Traffic	)	
	)	

**COMMENTS OF KMC TELECOM, INC.
IN SUPPORT OF REQUEST BY ALTS
FOR CLARIFICATION OF THE COMMISSION'S RULES
REGARDING RECIPROCAL COMPENSATION FOR
INFORMATION SERVICE PROVIDER TRAFFIC**

KMC Telecom, Inc. ("KMC") submits these comments in support of the request filed by the Association for Local Telecommunications (ALTS) for expedited clarification of the Commission's rules. At issue is the right of competitive local exchange carriers ("CLECs") to receive reciprocal compensation pursuant to section 251(b)(5) of the Telecommunications Act of 1996 for the transport and termination of traffic to CLEC subscribers that are information service providers ("ISPs"). KMC is a competitive local exchange carrier. KMC is authorized to provide local exchange service in states where subsidiaries of Ameritech, NYNEX, Bell Atlantic, SBC, BellSouth and US West are the incumbent carriers. KMC has received letters from NYNEX, Bell Atlantic and Southwestern Bell, taking the position that ISP traffic is not subject to the reciprocal compensation obligation. See attached Declaration of Tricia Breckenridge ("Breckenridge Decl.") ¶ 2.

Section 251(b)(5) of the Act imposes on each local exchange carrier the duty to establish

"reciprocal compensation arrangements for the transport and termination of telecommunications." In its Local Competition Order, the Commission concluded that "the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic." Local Competition, First Report and Order ¶ 1034. Several ILECs have now taken the position that most or all calls to and from ISPs are "interexchange traffic," and thus not subject to reciprocal compensation. Their theory is that calls to an ISP provider do not "terminate" at the ISP provider's site, but instead at the site of the source of the information that the provider enables its customer to access. ALTS asks the Commission to clarify that nothing in its Order was intended to change the treatment of such traffic as local traffic.

Section 51.701(a) of the Commission's regulations limits reciprocal compensation to "local telecommunications traffic," defined by section 51.701(b)(1) as traffic that "originates and terminates within a local service area established by the state commission." Thus for incoming calls to an ISP, the ultimate issue is where the call "terminates" within the meaning of section 51.701(b)(1). The Commission has broad discretion to interpret its own regulations, and the courts will uphold its interpretation so long as it is not plainly erroneous or inconsistent with the regulation. Thomas Jefferson Hospital v. Shalala, 512 U.S. 504, 512 (1994). The agency's discretion is at its height where "the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" Id., 512 U.S. at 512, quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991).

In this case neither the regulation, the Local Competition Order itself, nor the statutory

language on which the regulation and the Local Competition Order are based, support the ILECs' interpretation. Nor do the relevant policy concerns support the ILECs. Accordingly, the Commission should exercise its interpretive discretion to clarify the regulation and the Local Competition Order, making it plain that they were not intended to exempt ISP traffic from the obligation to provide reciprocal compensation.

I. The Local Competition Order Did Not Exempt ISP Traffic from Reciprocal Compensation.

In the Local Competition Order, the Commission recognized that "transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network function." Local Competition Order ¶ 1033. Nevertheless, the Commission ruled that the reciprocal compensation requirement "do[es] not apply to the transport or termination of interstate or intrastate interexchange traffic." Id. ¶ 1034. It is this ruling that the ILECs seek to have applied to ISP traffic.

The ILECs stretch the Commission's ruling in the Local Competition Order too far. The reason for the Commission's ruling was to preserve the integrity of the access charge system. The Commission explained that "[t]he Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic." Id. ¶ 1033. This reason does not apply to ISP traffic, since such traffic is not subject to interexchange access charges. Access Charge Reform Order ¶ ¶ 344, 345. "[A] rule ceases to apply when the reason for it dissipates." United States v. Dudley, 739 F.2d 175, 177 (4th Cir. 1984).

The ILECs obviously believe that there are unique costs associated with ISP traffic, and

that the present system does not adequately compensate these costs. The Commission is considering this issue in a separate proceeding. Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, CC Dockets 96-262, 94-1, 91-213 and 96-263 (rel. December 24, 1996). That proceeding -- or state tariff proceedings -- are the proper forums for resolving the ILECs' concerns. The ILECs may not resolve their alleged problem of undercompensation of ISP costs by jettisoning the reciprocal compensation system.

Under the ILECs' view, no compensation at all would be paid for this traffic -- which is hardly a solution for alleged undercompensation. Alternatively, the ILECs' view that calls to ISP providers are "interexchange" would suggest that interexchange access charges should be levied. But the Commission has already decided that the interexchange access charge system does not apply to ISP traffic; if it did, it would only impose a subsidy program on "the vibrant and competitive free market that presently exists for the Internet and other interactive computer services" which Congress intended to preserve "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2); Access Charge Reform Order, ¶ 344. An access charge system which was designed to provide above-cost payments as a source of subsidies for universal service, and which Congress intended to phase out in the near future as explicit subsidies for universal service are in place, is clearly not a viable or lasting solution for whatever problems may exist, if any, in the present system of compensation for ISP traffic.

II. Exemption of ISP Traffic from Reciprocal Compensation Would Be Inconsistent with the Language and Policy of the Telecommunications Act of 1996.

Section 251(b)(5) requires reciprocal compensation "for the transport and termination of telecommunications." There is nothing in the ordinary meaning of "transport" and "termination"

-- or in the statutory definition of "telecommunications" (section 3(43)) -- that restricts the reciprocal compensation requirement to any particular type of call. The "transport" and "termination" of ISP calls fall literally within the meaning of section 251(b)(5).

The ILECs have adduced no reason why section 251(b)(5) should not be applied as written. In the Local Competition Order, the Commission found an implicit exception to the literal language of section 251(b)(5), based on the inconsistency between the cost-based pricing standard applicable to reciprocal compensation under section 252(d)(2) and the system of above-cost access charges preserved for interexchange traffic by section 251(g)(2). Local Competition Order, ¶ ¶ 1033, 1034. But since the statutory basis for the exception was the access charge system, there is no reason to apply it to ISP calls which are not subject to that system. Since the ISP situation "does not fall within the rationale that brought about the statutory exception," the general statutory rule requiring reciprocal compensation applies. Greene v. United States, 79 F.3d 1348, 1355 (2d Cir. 1996).

In any event, the ILECs are wrong in classifying ISP calls as interexchange calls. Calls to an ISP provider are placed using the customer's local exchange number. The call "terminates" at the ISP's equipment. When the ISP accepts the call, answer supervision is returned and a local call has been established. The local call remains in effect for the duration of the Internet session, even though particular calls from the local ISP that are part of the session may be in effect for varying lengths of time.

Moreover, ever since the Computer II decision, it has been clear that the services provided by the ISP are not subject to regulation as common carriage, and thus as a legal matter are not in the same category as the local call made by the ISP subscriber. Second Computer

Inquiry, 77 F.C.C.2d 384, ¶ ¶ 119-132 (1980). Thus there is a legal, as well as a technical, line between the local call to the ISP provider, which is common carriage, and the information services that the caller accesses, which is not.

As a matter of common usage within the telecommunications industry, a call placed over the public switched network is "terminated" when it is delivered to the Telephone Exchange Service bearing the called telephone number. The fact that the signal may be routed to other destinations does not change the point of termination. The situation is no different from a conference call, where a call is made to a local recipient who in turn may conference in a caller in another exchange. Although the initial caller's signals may be reaching a third party in another exchange, the initial call is still considered to "terminate" at the local recipient's phone, and is considered a local rather than an interexchange call.

Nor have the ILECs themselves treated ISP calls as interexchange calls for billing purposes when both the customer and the ISP are ILEC customers. For example, as the staff of the New York Public Service Commission points out, the ILECs' theory "is at odds with NYT's own treatment of this traffic as intrastate in its assessment of usage charges to other customers." See NYPSC letter of May 29, 1997, attached to ALTS letter. And as the ALTS letter points out (at p. 7 n. 10), Bell Atlantic has stated that its expanded Internet Access Service would provide that "Bell Atlantic's vendor will subscribe to local telephone services . . . to receive the call." The ILECs have not, and cannot, explain why ISP calls should be treated differently depending on whether or not a CLEC customer is a party to the call. If, as the ILECs now argue, calls to a local ISP provider do not "terminate" at that number, but instead at the site of whatever information source the ISP provider enables its customer to access, that would hold true

regardless of whether service to the ISP provider were provided by a CLEC or by the ILEC itself.

The ILECs' position has been rejected by six state regulatory agencies. In addition to the New York Public Service Commission, [1] the regulatory commissions of Arizona,[2] Colorado,[3] Minnesota,[4] Oregon,[5] and Washington[6] all have declined to treat traffic to enhanced service providers, including ISP providers, any differently than other local traffic.

The principal authority relied on by the ILECs is United States v. Western Electric Co., Inc., 1989 Trade Cas. ¶ 68,400 (D.D.C. 1989), where the district court held that Bell Atlantic would violate the MFJ's restriction against interLATA entry by operating an information service

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[1] See NYPSC letter of May 29, 1997 to New York Telephone Company, attached to ALTS Request.

[2] *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996,* Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 et al. (Arizona Corp. Comm. Oct. 29, 1996) at 7.

[3] *Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc.,* Decision Regarding Petition for Arbitration, Docket No. 96A-287T (Col. PUC Nov. 5, 1996) at 30.

[4] *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996,* Order Resolving Arbitration Issues, Docket Nos. P-442,.421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Minn. PUC Dec. 2, 1996) at 75-76.

[5] *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996,* Commission Decision, Order No. 96-324 (Ore. PUC Dec. 9, 1996) at 13.

[6] *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc., Pursuant to 47 USC § 252,* Arbitrator's Report and Decision, Docket No. UT-960323 (Wash. Utils. and Transp. Comm. Nov. 8, 1996) at 26.

in which the users would dial a local gateway within their own LATA, and thereby become able to communicate with a central processor located in another LATA.

That case, however, differed significantly from the present situation. In the MFJ case, Bell Atlantic proposed to provide interLATA communication between the central processor and the local gateway. Thus Bell Atlantic would have been directly providing an interLATA service. As the district court pointed out, that raised the danger that local subscribers tied to the RBOC monopoly would have to "cross-subsidize the service with respect to its inter-LATA characteristics." Id. at p. 60,204. The district court's conclusion is reflected in section 272(a)(2)(C) of the 1996 Act, requiring the RBOCs to operate interLATA information services through a separate affiliate. Neither the district court's conclusion, however, nor section 272(a)(2)(C), suggest in any way that the information services provided by the ISP provider are part of the local calls through which the provider's customers access those services.

In addition, the Bell Atlantic-MFJ precedent and the present controversy involve entirely different legal issues. The present controversy involves section 251(b)(5) of the 1996 Act, not the restrictions of the MFJ. The ultimate legal issue is whether transport and termination of ISP calls constitute "transport and termination of telecommunications" within the meaning of the reciprocal compensation requirement of 251(b)(5), not whether RBOC provision of interLATA information services would be anticompetitive. The policy issues involved are entirely different, and the Commission has ample discretion to take policy issues into account in determining what label to apply to ISP traffic.

The basic premise of the ILECs' legal arguments is that if a call is classified as "interexchange" for one purpose, it must be classified as "interexchange" for all purposes. But

that premise falls of its own weight. For example, as previously described, the ILECs themselves treat calls from ISP customers to local ISP providers as local calls. Indeed, were they to do otherwise, they would be in violation of section 271 in providing provide this service. Thus the LECs' own actions concede that local ISP calls are "local" rather than "interexchange" for at least some purposes. And once it is conceded that the Commission must look to the purpose of the "interexchange" classification, the ILECs' case collapses, since they can adduce no purpose relevant to the Telecommunications Act that would support exempting ISP calls from the reciprocal compensation requirement of section 251(b)(5).

III. Exempting ISP Calls from Reciprocal Compensation Would Violate the Policies of the Act.

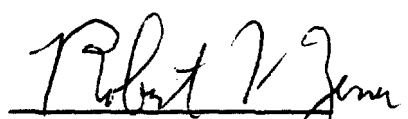
Classifying local calls to ISP providers as "interexchange" for purposes of the "interexchange" exemption from reciprocal compensation would violate the policies of the Act, by making it virtually impossible for CLECs to compete for ISP business. For the typical ISP operation, the overwhelming portion (well over 99%) of the telecommunications traffic is in the form of incoming calls. Breckenridge Decl. ¶ 3. Under present competitive conditions, the overwhelming majority of these calls are from ILEC subscribers. If compensation for transport and termination of these calls ceases, the ILECs may still charge for these calls by billing their subscribers, in many cases also collecting charges for second lines. But that benefit from ISP business will be almost totally absent for the CLECs, who will have to pay for upkeep and maintenance of the heavily-used ISP lines without compensation for transport and termination, and without significant outgoing traffic they can bill to the ISP. Any interpretation of the Act giving incumbent carriers an automatic advantage in bidding for a significant segment of the

commercial market clashes with the basic policy of the Telecommunications Act to foster competition in the local exchange market. And by effectively removing the CLECs from competing for ISP business, the ISPs would be deprived of the benefits of a competitive market for their phone service, contrary to the policy of the Act "to preserve the vibrant and competitive free market that presently exists for the Internet." Section 230(b)(2).

CONCLUSION

The Commission should clarify that calls between ISPs and their subscribers within the same local exchange area are local calls entitled to reciprocal compensation under section 251(b)(5) of the Act and the Commission's regulations when the calls are terminated to a CLEC.

Respectfully submitted,



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July 17, 1997

DECLARATION OF TRICIA BRECKENRIDGE

1. I am Vice President, Corporate Development, for KMC Telecom, Inc. ("KMC"). My responsibilities include, among other things, development of business plans for expansion into new cities, including market assessment of the customer base and assessing the regulatory environment. I make this affidavit on the basis of personal knowledge or, as to matters not within my personal knowledge, on the basis of communications I have received in the regular course of business.

2. KMC is a competitive local exchange carrier. KMC is authorized to provide local exchange service in states where subsidiaries of NYNEX, Bell Atlantic, SBC, BellSouth and US West are the incumbent carriers. KMC has received letters from NYNEX, Bell Atlantic and Southwestern Bell taking the position that ISP traffic is not eligible for reciprocal compensation.

3. From the standpoint of KMC, the inability to collect any compensation for incoming calls would destroy the possibility that providing local service to an ISP provider could be profitable. Based on the service KMC has already provided to an ISP customer, as well as other data it has reviewed, it appears that over 99% of the local traffic to an ISP provider, measured by minutes of usage, is incoming. In light of this fact, it makes no business sense for a competitive carrier to incur the costs of providing service to an ISP provider, without compensation for transport and termination of incoming calls. In this respect, the competitive carrier is in a different position than the incumbent. The vast majority of incoming calls to an ISP provider will be from the incumbent carrier's own customers, whom it may bill for the calls

(as well as, in many cases, collecting a charge for the second line that Internet users may purchase). For these reasons, KMC would not compete for ISP providers' business if it cannot receive compensation for transport and termination of incoming calls.

I declare under penalty of perjury that the foregoing is true and correct.

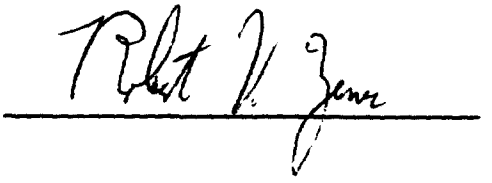
TRICIA BRECKENRIDGE

Tricia Breckenridge

Executed on this 16 day of July, 1997

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments of KMC Telecom, Inc. In Support of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic have been served this 17th day of July 1997 as indicated on the attached.



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